STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 17, 2013
v	No. 312054 Wayne Circuit Court
JOSHUA DANTE BOWMAN-ROUSER, Defendant-Appellant.	LC No. 11-009890-FH

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a bench trial of felonious assault, MCL 750.82. The trial court sentenced him to one year of probation. We affirm.

Defendant's conviction arose from an altercation with Winston Claxton outside of Redford Union High School. Defendant spotted Claxton after school and got out of his car to confront him about "laced" marijuana that had been sold to one of defendant's friends. According to Claxton, defendant pulled out a knife during this confrontation. Claxton's testimony was corroborated by Officer Matt Lazell, who saw defendant with a knife in his hand when the officer arrived at the scene. Defendant denied having a knife and two other witnesses, Sade Moore and Justine Williams, both of whom were riding in defendant's car before the incident, denied seeing a knife.[1] Before Officer Lazell approached defendant, he lost sight of the knife. When Officer Lazell searched defendant, Moore, Williams, and defendant's vehicle, he was unable to recover the knife. The trial judge found that the prosecution had proven all of the elements of felonious assault beyond a reasonable doubt.

I. SUFFICIENCY OF THE EVIDENCE

Defendant contends that insufficient evidence was presented at trial in order to establish that the elements of felonious assault were proven beyond a reasonable doubt. We disagree.

[1] Williams was asked about having seen a "weapon," a term which encompasses a knife.

"This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial." *People v Lanzo Const Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). This Court reviews "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012) (citation and internal quotation marks omitted). Circumstantial evidence and reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "All conflicts in the evidence must be resolved in favor of the prosecution." *Id.*

A person commits felonious assault if that person "assaults another person with a gun, revolver, pistol, knife . . . or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder . . . ." MCL 750.82(1). "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

First, defendant asserts that there was insufficient evidence to prove the element of "assault" beyond a reasonable doubt. To establish an assault, the prosecutor must show "an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). The assault element is satisfied where the circumstances indicate some overt, threatening conduct putting another in reasonable apprehension of an immediate battery. *People v Reeves*, 458 Mich 236, 244; 580 NW2d 433 (1998). Circumstantial evidence and reasonable inferences that arise from the evidence can constitute satisfactory proof of this element. See, generally, *Carines*, 460 Mich at 757.

Viewing the evidence in the light most favorable to the prosecution, sufficient evidence existed to show defendant's use of threatening conduct that put Claxton in reasonable apprehension of an immediate battery. Defendant got out of his vehicle and confronted Claxton, asking him, "[w]hy did you lace my [friend]'s weed?" Claxton and defendant were standing face-to-face, approximately two feet from each other, according to a witness. Claxton, who was unarmed, took off his book bag because he thought defendant was going to attempt to hit him. Then, defendant pulled out a knife that was approximately four inches long. Defendant and Claxton were restrained by their friends. As Officer Lazell approached the scene, he observed Claxton and defendant getting ready to fight, and he saw a knife in defendant's hand. The confrontation ended when Officer Lazell drew his weapon and ordered defendant to the ground. On cross-examination, defense counsel asked Claxton, "[y]ou knew that he might stab you; correct?" Claxton responded, "[y]es."

Defendant argues that Claxton was not put not in "reasonable apprehension" of a battery because Claxton never testified that defendant attempted to stab him with the knife and never testified that he was afraid that defendant was going to commit a battery. However, in viewing the evidence in the light most favorable to the prosecution, the fact that defendant got out of his vehicle to confront Claxton about selling "laced" drugs; pulled out a knife while face-to-face

with Claxton, who was unarmed; and had to be restrained by his friends shows evidence of overt, threatening conduct putting Claxton in reasonable apprehension of a battery. *Reeves*, 458 Mich at 244. Even though Claxton did not expressly testify that he was fearful of an immediate battery, on cross-examination, Claxton indicated that he knew defendant might stab him. The evidence established the first element of felonious assault.

Next, defendant asserts that insufficient evidence was presented to show that he possessed a "dangerous weapon" because Officer Lazell never found the knife, even after searching defendant, his vehicle, and the two women who were with defendant that day. However, despite this contention, the evidence presented at trial was sufficient to infer otherwise. According to Claxton, defendant pulled out a "black knife, like a switchblade," approximately four inches long. Officer Lazell corroborated this testimony when he testified that, "as I approached [defendant and Claxton], I saw a knife in one of the boy's hands, and so I ordered that young man to the ground." Officer Lazell also confirmed that the "blade appeared to be a few inches long" and he could see it "glistening off the sun." When asked how certain he was that he saw defendant with a knife, Officer Lazell responded, "[a] hundred percent."

There was sufficient evidence from which a rational trier of fact could find that defendant did, in fact, possess a knife. Indeed, this Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Kanaan*, 278 Mich App at 619. The trial court stated:

> So I know [Officer Lazell] saw a knife, because he searched the car twice. He even searched these young women. And not only that, why would the officer make up the same story that Mr. Claxton makes up?

The trial court clearly found Claxton's and Officer Lazell's testimony credible.

With respect to the third element, defendant's intent to injure or place Claxton in reasonable apprehension of an immediate battery, sufficient evidence was presented to prove this element. This Court has held that because of the difficulty in proving intent, minimal circumstantial evidence is sufficient to prove an actor's state of mind. *Kanaan*, 278 Mich App at 622. In viewing the evidence in the light most favorable to the prosecution, there was circumstantial evidence sufficient to prove that defendant intended to put Claxton in reasonable apprehension of an immediate battery. This is evidenced by the facts that defendant got out of his vehicle to confront Claxton, pulled out the knife during the confrontation, and had to be restrained. Pulling out a knife during a face-to-face confrontation shows defendant's intent to place Claxton in apprehension of an immediate battery, thereby satisfying the third element of felonious assault.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was deprived of his constitutional right to the effective assistance of counsel because his trial counsel failed to conduct a reasonable investigation and interview witnesses. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A

trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id*.

In order to establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant must also show that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (internal citation and quotation marks omitted). "A defendant must also overcome a strong presumption that the assistance of his counsel was sound trial strategy . . . ." *People v Sabin*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first asserts that trial counsel was ineffective for failing to conduct a reasonable investigation. Trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004) (internal citation and quotation marks omitted). "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *Id*. at 493.

Defendant's main contention is that, had trial counsel conducted an investigation, he would have discovered Oneshia Lee, who could have been subpoenaed to testify on defendant's behalf. Despite this contention, defendant has not presented any evidence that Lee would even testify on defendant's behalf. Defendant's only basis for his assertion is an *unsigned* affidavit stating that Lee witnessed the events and that defendant did not have a knife. However, in his appellate brief, defendant concedes that Lee did not sign the affidavit because "she had second thoughts about getting involved in the case after the conviction." Defendant has not established any factual predicate regarding what Lee would have testified to had she been subpoenaed.[2]

Next, defendant contends that trial counsel was ineffective for failing to interview witnesses. When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). The failure to interview witnesses does not alone establish inadequate preparation. *Id*. at 642. To obtain relief, a defendant must show that "the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *Id*.

[2] We note that even if Lee had testified about the lack of a knife, this testimony would have been cumulative.

Defendant asserts that trial counsel's failure to interview Moore and Williams before the day of trial prejudiced defendant. At the hearing on defendant's Motion for New Trial or Judgment of Acquittal under MCR 7.208(B)(1), he briefly argued that trial counsel only interviewed Moore and Williams "five or ten minutes before trial." However, appellate counsel offers no argument in his brief regarding how this prejudiced defendant. In any event, nothing in the record indicates that trial counsel's failure to interview these witnesses resulted in his ignorance of valuable evidence that would have substantially benefitted defendant. Both Moore and Williams testified that they did not see defendant with a knife, and the gist of their testimony was that defendant did not threaten Claxton. This testimony clearly benefitted defendant. Both of the witness's stories helped corroborate defendant's version of the events that occurred on that day.

Defendant also claims that he was prejudiced by trial counsel's failure to interview Officer Lazell before trial. Once again, defendant provides no argument regarding how this resulted in prejudice. On cross-examination, trial counsel effectively elicited testimony from Officer Lazell that he conducted a thorough search for the knife, but was unable to find it. Trial counsel questioned Officer Lazell about the unsuccessful searches conducted on defendant, Moore, Williams, and defendant's vehicle. From the record, it appears that this line of questioning advanced the defense's theory that defendant did not have a knife. Even assuming that defendant had properly briefed this issue, any failure to interview Officer Lazell did not fall below an objective standard of reasonableness and did not change the outcome of the trial.

Lastly, defendant contends that trial counsel made a serious error when he agreed to waive a jury trial[3] because the trial judge was prejudiced in favor of the prosecution. The only support given in defendant's appellate brief for this argument is the following statement by the trial court, given at the hearing for defendant's Motion for New Trial or Judgment of Acquittal under MCR 7.208(B)(1):

> I've been doing this thirty years in this court. So, please don't tell me that weapons don't just disappear. I've had experiences of seeing girlfriends who have secreted weapons in their purses when the police arrived so that the weapon disappeared from the other person.
>
> So, weapons do disappear.

Apparently, defendant claims that the trial judge's reference to the other cases where a weapon had disappeared showed bias in favor of the prosecution. However, defendant fails to provide any connection between (1) this statement by the trial judge at a hearing after defendant had been convicted and (2) trial counsel's alleged knowledge of the purported bias before trial and his role in defendant's decision to waive a jury trial. Defendant's argument does not overcome the presumption that a waiver of a jury trial was sound trial strategy. *Sabin*, 242 Mich App at 659.

[3] Defendant waived his right to a jury trial on the record.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad